



For Action

THE MINISTER'S DIRECTION TO THE CANADA BORDER SERVICES AGENCY ON SURVEILLANCE AND CONFIDENTIAL HUMAN SOURCES

For the President

ISSUE

This briefing package seeks your approval of the proposed Ministerial Direction (MD) to the Canada Border Services Agency (CBSA) on the use of surveillance and confidential human sources (CHS) as investigative techniques (see attachment 1).

BACKGROUND

In September 2013, the Minister of Public Safety and Emergency Preparedness agreed to issue a direction to the CBSA,

regarding the use of investigative techniques, such as surveillance and CHS

In 2014, Public Safety Canada (PS), in consultation with the CBSA and the Department of Justice, developed an MD that aligned with the requirements of the Agency's surveillance policy and the CHS policy. The MD was never formally issued.

In 2019, the National Security and Intelligence Committee of Parliamentarians (NSICOP) reviewed CBSA's national security and intelligence activities and recommended that the Minister provide written direction to the CBSA on the conduct of sensitive activities:

"The Minister of Public Safety and Emergency Preparedness provide written direction to the Canada Border Services Agency on the conduct of sensitive national security and intelligence activities. That direction should include accountability expectations and annual reporting obligations."

CONSIDERATIONS

The proposed draft MD is modelled after the direction that was developed
It is focused on the key areas of concern, namely that

NEXT STEPS

Upon approval, CBSA will submit the final version of the MD to PS, who will then provide it to the Minister for approval and issuance.

RECOMMENDATION

As noted above, the attached draft MD is aligned with the CBSA's policies and ensures enhanced oversight and accountability for the Agency's risk-inherent activities. It is recommended that you approve the draft MD.

President's response

I approve

I do not approve

John Ossowski

Date

FEB 21 / 20

ATTACHMENTS

2. CSIS Ministerial Direction for Accountability

Approved by:

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Date:

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MINISTERIAL DIRECTION FOR ACCOUNTABILITY

The Government and the people of Canada expect a high level of performance by the Canadian Security Intelligence Service (the Service or CSIS) in discharging its responsibilities under the *Canadian Security Intelligence Service Act (CSIS Act)*. It is also expected that the Service will perform its mandate in accordance with the rule of law and respect for the rights and freedoms guaranteed under the *Canadian Charter of Rights and Freedoms*.

Accountability is fundamental to our system of government, and in maintaining the confidence of Canadians. The system of accountability for CSIS rests on two pillars:

1. Accountability to myself, as the Minister responsible for CSIS; and
2. External accountability through review bodies such as the National Security and Intelligence Review Agency and the National Security and Intelligence Committee of Parliamentarians, and to Canadians through transparency.

Pursuant to subsection 6(2) of the *CSIS Act*, I have issued the following direction to describe my expectations of the Service with regard to accountability.

1. Principles of Accountability

As CSIS fulfils its mandate, I expect the following key principles to underpin how the Service will meet its accountability obligations:

- All Service activities shall be lawful and authorized, meaning they shall comply with the laws of Canada, including the *Charter of Rights and Freedoms*, the *Privacy Act*, and the *CSIS Act*, and be consistent with Ministerial Direction and CSIS' internal policy framework. Employees are only to undertake action after the appropriate authorization or approval has been obtained;
- The Service has a duty to inform the Minister of any such matter as is relevant to enable the Minister to fulfill the Minister's accountabilities as outlined in the *CSIS Act*;
- The Service has a duty of ensuring full, fair, and frank disclosure in its engagement with the Federal Court to ensure that it complies with the duty of candour, which is essential to the integrity of the warrant application process.

2. General

The Director is responsible for the control and management of the Service in accordance with the *CSIS Act* and with Ministerial Directions issued, to be further specified through internal policies and procedures.

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The Service will inform the Minister and the Deputy Minister of Public Safety Canada in a timely manner of any activity that has contravened the requirements set out in this or any other direction issued by the Minister to the Service.

The Service will maintain internal policy and compliance frameworks to ensure compliance with the laws of Canada, Ministerial Direction, decisions of the Court and terms and conditions set by the Court.

The Minister will be advised, in a timely manner, of any non-compliance issue that could have an adverse effect on Canadian interests or constitute a matter of potential public controversy. Compliance issues of lesser significance will be included in the Service's annual report to the Minister pursuant to s.6 of the *CSIS Act*.

Any instance where the Director is of the opinion that an employee or employees may have acted unlawfully, in the performance of their duties and functions, will result in a report to the Minister pursuant to s.20(2) of the *CSIS Act*.

3. Notification of the Minister

The Director will advise the Minister of issues on a case-by-case basis as necessary. In general terms, the Minister expects to be consulted or informed regarding any action on which a Deputy Head would normally involve his or her Minister.

For legal developments or ongoing court proceedings, the Director will inform the Minister in a timely manner of new legal issues, and matters of substance that are before the courts.

The Service will notify the Minister and the Deputy Minister of Public Safety prior to undertaking operational activities assessed as high risk according to any one of the four pillars of risk in the risk framework in Annex A.

The Service will notify the Minister, in advance, of operational activities where a novel authority, technique, or technology, is used. This includes novel uses of existing authorities, techniques, or technologies.

The Service will notify the Minister in a timely manner when a review body informs the Service in writing about a possible unlawful activity or contravention of Ministerial Direction it has identified, or where a review body has otherwise identified to the Service in writing a specific legal or compliance finding, including when a review body indicates that CSIS was not in compliance with internal policies, or where those policies are identified as inadequate.

All written briefings and follow-up notes to the Minister under this section should also be sent concurrently, for information, to the Deputy Minister of Public Safety Canada.

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4. Cooperation with Public Safety

The Director shall consult with the Deputy Minister of Public Safety on the following matters:

- The general operational policies of the Service as required pursuant to section 7(1) of the *CSIS Act*;
- Warrant applications as required by section 7(2) of the *CSIS Act*; and
- Pursuant to section 7(1)(b) of the *CSIS Act*, as soon as feasible, the following:
 - Legal developments that present new legal issues and matters of substance before the courts; and
 - Plans or proposals to use or seek a novel authority, technique or technology.

In furtherance of the above, CSIS will work with Public Safety on the development of a Public Safety-CSIS Framework for cooperation. The Public Safety-CSIS Framework for cooperation will address specifics on the scope, and parameters for disclosure, of information on legal, policy and operational issues, including the issues outlined in this direction, which will be shared between CSIS and Public Safety. The Framework will be completed within six months of issuance of this Direction.

5. Full, Fair, and Frank Disclosure to the Federal Court

Warrant applications are heard *ex parte* and *in camera*. The Service and counsel for the Attorney General of Canada have an obligation to provide full, fair, and frank disclosure to the Court, which is essential to the discharge of the “duty of candour” owed to the Court.

The CSIS-DOJ Policy on the Duty of Candour in *ex parte* Proceedings includes principles relevant to the discharge of the duty of candour by the Service, such as:

- Information must be presented completely, accurately, fairly, and fully;
- The affiant must be knowledgeable, authoritative and independent;
- Counsel and affiants must be transparent; and
- Errors in authorization or execution must be brought to the Court’s attention promptly.

The Service will fully implement the Policy. In so doing, the Service will develop processes and put in place the necessary supports in this regard, in consultation with the Deputy Minister, and will provide regular updates as to implementation.

6. Director's Annual Report to the Minister

The Director's annual report to the Minister will focus on the operational activities of the Service, and is intended to demonstrate the Service's fulfilment of its duties and functions during the reporting period in accordance with Canadian law and Ministerial direction.

Given that the Service fulfils its duties and functions in an ever-evolving threat environment, the report should include discussion and analysis of strategic developments and their effect on CSIS' ability to fulfill its mandate.

The Director will include an overview of legal and strategic issues facing the Service, and the efforts undertaken to address them, in the annual report.

A summary of incidences of non-compliance with Canadian law or Ministerial Direction during the period must be included in the annual report.

The Director's annual report should also include:

- required reporting outlined in the *CSIS Act*;
- the numbers of:
 - individuals under the age of 18 that were targets or sources;
 - human source resettlements that occurred;
- an overview of Service operational activities directly involving Canadian fundamental institutions which include: religious institutions, academia, trade unions, government and political institutions, and the media;
- an overview of changes to the status of the Service's domestic and foreign arrangements under sections 13 and 17 of the CSIS Act;
- a general description of otherwise illegal acts or omissions committed by designated employees, and otherwise illegal activities directed by designated employees;
- an overview of training provided to employees designated under section 20.1;
- an overview of the Service's operational activities abroad;
- details of the the number, location and rationale regarding firearms' issuance;
- the Director's decisions, if any, with respect to cases referred to the Director in accordance with the Ministerial Direction on Avoiding Complicity in Mistreatment by Foreign Entities;
- reporting on the use of threat reduction measures during the reporting period; and

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- the numbers of: emergency designations, authorizations, number of occurrences designated employees directed individuals to conduct such acts, and a description of the acts or omissions undertaken in relation to the threat.

The Director will provide the annual report to the Minister by August 31 following the end of the fiscal year.

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Annex A – Risk Assessment

Legal risk is to be assessed in accordance with the Department of Justice risk assessment criteria.

Operational security risk is to be assessed in terms of the operating environment and Service operational activities and tradecraft, including the risk of death or bodily harm.

Reputational risk is to be assessed, in consultation with Public Safety Canada, and include the potential for public controversy, as well as the risk of discrediting the Service or the Government of Canada.

Foreign policy risk is to be assessed in consultation with GAC in terms of the Government of Canada's foreign policy interests, bilateral and international relations, Canada's reputation, and the security of its missions and personnel abroad, including:

- risk of severely damaging Canadian relations with any state or intergovernmental body;
- risks associated with the covert physical entry of Service personnel or human sources into premises of foreign diplomatic missions, in Canada or abroad;
- risk of severely damaging the Government of Canada's interests abroad, including but not limited to economic, security and defence interests; and
- risk of harming the safety and security of Canadians abroad, including the safety and security of Canada's missions abroad and their personnel, directly or as a result of retaliation.